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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION – LOS ANGELES

IN RE LIVE CONCERT ANTITRUST LITIGATION

This document relates to:

ALL ACTIONS

Case No.: 2:06-MDL-01745 SVW (VBKx)

JOINT MEMORANDUM IN SUPPORT OF THE PARTIES' SETTLEMENT PROCESS

Hearing: None
Time: None
Courtroom: 6
Judge: Hon. Stephen V. Wilson
Trial Date: None

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I. INTRODUCTION

Pursuant to the Court's order dated May 29, 2012 (Dkt. 618), the Parties to this multidistrict litigation ("MDL") jointly submit this memorandum to address the [Proposed] Order Granting Joint Stipulation Regarding Decertification of Classes, filed on May 22, 2012 (Dkt. 616). In its May 29, 2012 order, the Court asked whether the proposed settlement process and the jointly proposed order regarding decertification would "contravene the parties' – or the Court's – obligations with respect to any putative class members." They will not. The settlement binds Defendants and the named class representatives only. The rights and claims of absent putative class members are not implicated. Indeed, absent class members will benefit from decertification, as decertification and settlement by the named class representatives is more preferable for absent class members than continuation of the litigation, fighting a certification battle, and potentially facing entry of summary judgment against the remaining classes. The requirements set forth in Fed. R. Civ. P. 23 for the settlement of class claims do not apply here because there are no class claims being settled.

II. BACKGROUND

Plaintiffs in this MDL, by and through their counsel of record, filed 22 regional putative class actions against Defendants in the Litigation alleging substantively identical claims of (1) Monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2; (2) Attempted Monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2; and (3) Unjust Enrichment. Among other things, each of the 22 actions alleged the identical product market (the market for "tickets to live rock concerts"), injury and causation. The actions ultimately were consolidated and assigned to this Court by the Judicial Panel on Multidistrict Litigation.

On November 1, 2006, the Court issued an order staying regional (but not national, corporate-level) discovery in every action except five "test" actions representing five geographic regions: Los Angeles, Denver, Boston, New York, and

Chicago. Dkt. 36, 37. On October 22, 2007, the Court issued an order certifying the classes in these five actions. Dkt. 160. On November 16, 2009, the Court denied Plaintiffs' motion for approval of plan for class notice for the five certified classes. Dkt. 215. No notice of class certification has ever been disseminated.

Following a stay of the case while the Ninth Circuit decided and reviewed its decision in *Dukes v. Wal-Mart Stores, Inc*., 603 F.3d 571 (9th Cir. 2010) (the "*Dukes* case"), the Court reactivated the case in October 2010. On December 10, 2010, the Court entered a stipulated order limiting discovery to the Denver and Los Angeles actions (but again permitting national, corporate-level discovery), and staying the Chicago, New York, and Boston actions until the Denver and Los Angeles actions were tried or otherwise resolved. Dkt. 260.

On March 23, 2012, the Court issued an order granting in part Defendants' motion to exclude certain testimony of Plaintiffs' sole expert, Dr. Owen Phillips, and granting summary judgment in favor of Defendants in the Denver and Los Angeles actions. Dkt. 605. Specifically, the Court held that Dr. Phillips' testimony "fail[ed] to satisfy Rule 702's requirements in both: (1) defining the relevant product market; and (2) populating this market for purposes of his analysis." *Id.* at 58. The Court further held that Dr. Phillips' testimony failed to satisfy the requirements of Rule 702 with respect to the (1) fact and amount of damages, and (2) causation of the Plaintiffs' alleged injury, and it excluded all testimony on those subjects except with respect to alleged ticket fees. *Id.* at 9-29. In light of the inadmissibility of Dr. Phillips' testimony, the Court held that Plaintiffs' evidence was insufficient as a matter of law to raise a genuine issue of fact as to the relevant product market for "tickets to live rock concerts" alleged by Plaintiffs. *Id.* at 61-62.

The Court recognized in its March 23, 2012 order that, when it certified the five "test" actions in October 22, 2007, it believed itself to be precluded by the Ninth Circuit's controlling decision in the *Dukes* case from resolving factual disputes and weighing conflicting expert testimony at the class certification stage.

But the *Dukes* case was subsequently superseded and later reversed by the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. __, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011), in which the Supreme Court held that an evaluation of expert testimony at the class certification stage is proper. Dkt. 605 at 5.

Following the March 23, 2012 order, Defendants expressed their intention to move for decertification of the five certified classes and for denial of certification of the remaining seventeen classes. In light of the Court's rulings regarding the legal insufficiency of the Plaintiffs' "rock" concert market and the inadmissibility of Dr. Phillips' testimony on relevant market, injury and causation, Defendants argued that Plaintiffs were necessarily unable to establish the commonality and predominance required for certification under Fed. R. Civ. P. 23(a) and 23(b)(3), or the ascertainability of purported class members. Defendants also expressed their intention to seek summary judgment in all 20 remaining cases on the basis of the rulings in the Denver and Los Angeles cases.

After considering the Court's March 23, 2012 order excluding the testimony of Dr. Phillips with respect to the alleged relevant product market and causal antitrust injury, as well as the Court's view of the Supreme Court's holding in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. __, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011), Plaintiffs and their counsel concluded that the alleged classes in the MDL would not likely remain certified or be certified and that summary judgment would be entered against the classes that are certified. Accordingly, Plaintiffs determined that it was in the best interests of both the named plaintiffs and the absent class members to terminate this litigation with prejudice to the named plaintiffs but without prejudice to the absent class members.

The Parties thereafter negotiated a settlement to terminate the litigation and resolve the outstanding claims of the individual class members, as well as any claims for recovery of costs and fees. The Parties executed the final global settlement on May 22, 2012. The settlement provides that the Parties will jointly

stipulate to decertification, and once the Court has entered the order of decertification, the Parties will file a joint stipulated dismissal with prejudice of all of the actions in this MDL pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii).

III. BECAUSE DECERTIFICATION IS IN THE BEST INTERESTS OF THE CERTIFIED CLASSES, THE COURT MAY PROPERLY DECERTIFY THE CLASS TO PERMIT THE NAMED PARTIES TO SETTLE INDIVIDUAL CLAIMS

In its May 29, 2012 Order, the Court asked the Parties to submit a brief explaining why an order decertifying the five classes currently certified "would not contravene the parties'—or the Court's—obligations with respect to any putative class members." Dkt. 618. Because decertification is in the best interests of the certified classes, and because the Parties' settlement is not binding on any of the absent class members, the Court may properly decertify the classes to permit the named Parties to settle individual claims. *Holloway v. Full Spectrum Lending*, No. CV 06-5975 DOC (RNBx), 2008 WL 4184648 (C.D. Cal. Sept. 4, 2008) is directly on point. In *Holloway*, after the court had certified the putative class action, but prior to notice being disseminated to the class, the class representative moved to decertify the class to permit an individual settlement of her claims. *Id.* The basis for the motion for decertification was that after the class had been certified, a federal court of appeal issued a decision that significantly affected the legal merits of the plaintiffs' claims. *Id.* The court thus granted the motion for decertification to allow an individual settlement of the plaintiff's claims, recognizing that it was "unlikely that Plaintiff will prevail on the merits" and as such, "[she] will probably not be able to fairly and adequately protect the interests of the class." *Id.* at *4.

Here, as in *Holloway*, decertification of the classes to permit individual settlements is proper because, as this Court recognized in its May 29, 2012 Order, it is unlikely that, absent a lengthy and completely successful appeal, Plaintiffs will be able to prevail on the merits of their claims in light of the Court's March 23, 2012 summary judgment order. Moreover, no absent class members will be prejudiced

because the Parties' settlement does not bind absent class members, and no class notice has ever been disseminated. *See In re Methionine Antitrust Litig.*, No. 00-1311, 2003 WL 22048232, at *5 (N.D. Cal. Aug. 26, 2003) (because "[plaintiff] never sent notice to prospective class members, the Court need not send notice of the dissolution to the prospective class").

The requirements and procedures of Rule 23 do not apply to a settlement that resolves only the individual claims of the named Parties following decertification. *See* Fed. R. Civ. P. 23(e). While at one time, courts interpreted Rule 23 to require court approval of a settlement of the individual claims of a plaintiff seeking to represent a putative class, *see, e.g.*, *Diaz v. Trust Territory of Pac. Islands*, 876 F.2d 1401, 1409 (9th Cir. 1989), the rule was amended in 2003 such that "[t]he new rule requires approval *only* if the claims, issues, or defenses of a *certified* class are resolved by a settlement, voluntary dismissal, or compromise." Fed. R. Civ. P. 23, Advisory Committee Notes to 2003 Amendment (emphasis added).

While the Court here was concerned in its May 29, 2012 order that "[s]ettling directly with a class representative, to the exclusion of other class members, generally is improper," the Parties have been unable to identify any authority that prohibits settling directly with a class representative where decertification of the class is appropriate because of developments in the litigation. To the contrary, *Holloway*, as discussed above, stands for the opposite rule. Moreover, the case cited by the Court in its order of May 29, 2012, *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079-80 (N.D. Cal. 2007), was stating the rule applicable to *class-wide settlements*: that a class settlement may be approved only where it "does not improperly grant preferential treatment to class representatives." This case is distinguishable from *Tableware* since there is no class settlement, and the named plaintiffs are not settling to the "exclusion" of absent class members because nothing in the settlement affects the rights of absent class members.

Indeed, the Parties' proposed procedure for resolving this litigation is in the best interests of the absent class members because they can seek to claim that it protects them from the adverse judgment against the Plaintiffs in the Los Angeles and Denver actions and protects them from the possibility of judgment against the Plaintiffs in the remaining three certified regions. The Ninth Circuit has recognized that where the class representatives have failed to produce evidence sufficient to withstand summary judgment, decertification of the class is beneficial to absent class members and preferable to entry of summary judgment against the entire class because it protects against the possibility that the class representative did not adequately represent the class. *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864, 869 (9th Cir. 1982) (affirming decertification where plaintiffs failed to present evidence supporting their claims after two and one-half years of discovery), *overruled on other grounds by Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987).

As set forth in the attached Declaration of Jennifer Fountain Connolly, in entering into this settlement, Class Counsel fully considered the best interests of the certified classes as well as the interests of putative class members.[1] First, Class Counsel concluded that, because the Court's March 23, 2012 Order would be reviewed under an abuse of discretion standard, obtaining a complete reversal of that decision would be both difficult and time-consuming. *Id.* ¶¶ 4, 5. Second, they determined that entering into a class-wide settlement would not be feasible because the parties could not certify a settlement class without expert testimony and because, even if a settlement class could be certified, any recovery to Class members would be minimal and largely absorbed by the costs of notice. *Id.* ¶ 7. Third, they determined that under governing Ninth Circuit authority they could not develop a *cy*

[1] Defendants lack sufficient knowledge regarding the statements in the Connolly Declaration and take no position on them here, but acknowledge that many options were explored in attempting to resolve these cases.

pres settlement that would directly benefit class members. *See Nachshin v. AOL, LLC*, 663 F.3d 1034, 1040 (9th Cir. 2011) (holding *cy pres* distribution must (1) address the objectives of the statutes under which underlying action is brought, (2) target the plaintiff class, or (3) provide reasonable certainty that any member will be benefitted). *Id.* ¶ 8. Fourth, after the Court's April 26, 2012 Order, Plaintiffs were facing the real possibility of having the classes decertified, or having the Court enter judgment against all five of the certified classes and thereafter having a substantial bill of costs entered. *Id.* ¶ 9. Given these circumstances, Class Counsel concluded that it was in the best interests of the Classes to seek decertification as part of a settlement between Defendants and the class representatives. *Id.* ¶¶ 10, 11.

The Court may therefore properly decertify the classes to permit the named Parties to settle their individual claims and resolve this litigation.

IV. DEFENDANTS BELIEVE THAT DECERTIFICATION IS APPROPRIATE IRRESPECTIVE OF ANY SETTLEMENT OF INDIVIDUAL CLAIMS BETWEEN THE PARTIES [2]

The factual and legal determinations made by the Court in its March 23, 2012 order granting summary judgment in the Los Angeles and Denver actions make it highly unlikely that Plaintiffs will be able to prove a single relevant product market or common antitrust injury or causation, precluding them from establishing commonality under Fed. R. Civ. P. 23(a) or predominance under Fed. R. Civ. P. 23(b)(3) with respect to any of the MDL actions. The Court's March 23, 2012 decision therefore effectively requires decertification of the classes (and denial of certification to the remaining putative classes).

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[2] Plaintiffs do not join this section of the Brief and explicitly reserve all arguments regarding the appropriateness of decertification should the Parties' settlement not be consummated, but Plaintiffs do agree that based on the Court's March 23, 2012 Order, (1) they faced the possibility of decertification and (2) the risk of decertification was one of the factors considered in entering into the settlement.

A. The Court May Decertify a Class at Any Time if Developments in the Litigation Reflect that Certification is Not Proper

All class certification decisions are provisional in nature. *See* Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."). Thus, "[e]ven after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160, 102 S. Ct. 2364, 2372, 72 L. Ed. 2d 740 (1982). Indeed, "[a] district court may decertify a class at any time." *Rodriguez v. W. Publ'g Corp*., 563 F.3d 948, 966 (9th Cir. 2009); *see also Marlo v. United Parcel Serv., Inc.*, 251 F.R.D. 476, 479 (C.D. Cal. 2008) ("The district court's order to grant class certification is subject to later modification, including class decertification."), *aff'd*, 639 F.3d 942 (9th Cir. 2011); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11, 98 S. Ct. 2454, 2458, 57 L. Ed. 2d 351 (1978) (a court's class certification order is "inherently tentative"). The Court is thus free to, and should, decertify the classes since, as discussed below, they do not meet the requirements of Rule 23 in light of the Court's March 23, 2012 Order.

B. Plaintiffs Cannot Prove a Relevant Product Market, Antitrust Injury, or Causation Through Class-Wide Evidence

Given the Court's March 23, 2012 order rejecting the testimony of Plaintiffs' expert on key issues concerning market definition, antitrust injury, and causation, Defendants contend that Plaintiffs cannot demonstrate that certification is proper, and Plaintiffs acknowledge that they are not likely to persuade the Court otherwise. Plaintiffs have the burden to demonstrate the propriety of class certification. *Wal-Mart*, 131 S. Ct. at 2551. "[C]ertification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" *Id.* (quoting *Falcon*, 457 U.S. at 161) "Frequently that 'rigorous analysis' will entail some overlap with the merits of the Plaintiffs' underlying claim. That cannot be helped." *Id.* As this Court has previously recognized, this

certification standard permits the Court to undertake "a meaningful analysis" of "the underlying facts of the case [and] the representations of the parties' respective experts." Dkt. 605 at 5; *see also Wal-Mart*, 131 S. Ct. at 2553-54 ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so[.]").[3]

Here, to meet the requirements of certification under *Wal-Mart*, Plaintiffs would have to demonstrate that, for each region, there is a single product market of all "rock" concerts linking together Plaintiffs' claims, as opposed to numerous distinct markets that would preclude class treatment. *See Wal-Mart*, 131 S. Ct. at 2553 (requiring plaintiffs to prove the existence of a general policy of discrimination). "[A] plaintiff claiming monopolization is obligated to establish the relevant market because the power to control prices or exclude competition only makes sense with reference to a particular market." *Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 229 (2d Cir. 2006). Thus, certification would be improper if Plaintiffs' cannot prove the existence of their alleged market for live "rock" concerts. *See Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145,

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[3]To establish commonality under *Wal-Mart*, Plaintiffs must prove the existence not just of common questions, but of common questions that have the potential to generate common answers. 131 S. Ct. at 2550-51 ("What matters to class certification . . . is not the raising of common 'questions' – even in droves –but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.") (citation omitted). Class treatment is appropriate only where the "claims . . . depend upon a common contention" that is "capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 2551. To satisfy the predominance requirement – a requirement that the Supreme Court has called a "vital prescription" that "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation" – common questions must predominate over any individual issues. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24, 117 S. Ct. 2231, 2249-50, 138 L. Ed. 2d 689 (1997). The predominance requirement is far "more demanding" than mere commonality. *Wal-Mart*, 131 S. Ct. at 2565-66.

1163 n.22 (9th Cir. 2003); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1475 (9th Cir. 1997), *aff'd*, 525 U.S. 299, 119 S. Ct. 710, 142 L. Ed. 2d 753 (1999). Without the single "rock" concert product market, there is no "glue" holding together the millions of divergent claims of putative class members, and therefore, no basis for class certification.

But Plaintiffs have demonstrated that they cannot prove their alleged "rock" concert market. The Court's March 23, 2012 order held that Plaintiffs could not prove the existence of the alleged "rock" concert market as a matter of law. Principles of collateral estoppel and *stare decisis* prevent the remaining plaintiffs – all of whom pled the identical "rock" concert market – from re-litigating this issue. *See, e.g.*, *Abbe v. v. City of San Diego, Cal.*, No. 3:05-cv-01629-DMS-RBB, ECF No. 833, at *10-12 (S.D. Cal. May 26, 2009), *aff'd in part, dismissed in part*, 444 Fed. Appx. 189, 190 (9th Cir. 2011) (collateral estoppel precluded relitigation of issues decided by test cases in a consolidated action), *cert. denied*, 132 S. Ct. 1062, 181 L. Ed. 2d 741 (2012). Under the doctrine of collateral estoppel (issue preclusion), "once an issue is raised and determined, it is the entire issue that is precluded, not just the particular arguments raised in support of it in the first case." *Applied Med. Resources Corp. v. U.S. Surgical Corp.*, 352 F. Supp. 2d 1119, 1125 (C.D. Cal. 2005) (quoting *Kamilche Co. v. United States*, 53 F.3d 1059, 1063 (9th Cir. 1995)). "Any contention that is necessarily inconsistent with a prior adjudication of a material and litigated issue . . . is subsumed in that issue and precluded by the effect of the prior judgment as collateral estoppel." *Kamilche*, 53 F.3d at 1063 (quoting 1B Moore's Federal Practice ¶ 0.443[2]). In other words, Plaintiffs cannot simply find another expert and try again to prove the existence of the "rock" concert market, as such re-litigation of a prior-adjudicated issue is prohibited by collateral estoppel.

Even without application of collateral estoppel, the cases are unlikely to be certified because the remaining Plaintiffs lack admissible evidence supporting their

alleged "rock" concert product market, and thus cannot "affirmatively demonstrate" this prerequisite to Rule 23 certification. *Wal-Mart*, 131 S. Ct. at 2551. Defendants would vigorously oppose any effort by Plaintiffs to seek additional discovery to try to prove the claimed product market. Courts routinely deny class certification discovery to plaintiffs, as the Southern District of New York (affirmed by the Second Circuit) did in the Heerwagen case which is the predecessor to the instant MDL actions. *See, e.g.*, *Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985) (trial court has discretion to deny class certification discovery); *Monreal v. Potter*, 367 F.3d 1224, 1238 (10th Cir. 2004) (same). And here, Plaintiffs have already had *years* of discovery, millions of pages of documents, and dozens of depositions (fact and expert) to try to prove the existence of the alleged "rock" concert market, but have come up empty. Plaintiffs cannot credibly claim entitlement to anything more, particularly where Plaintiffs' exclusive reliance on national data (produced years ago) refutes any argument that additional regional discovery could add anything to the analysis.

Likewise, Plaintiffs have an uphill battle to try to demonstrate that antitrust injury and causation can be proven through class-wide evidence. Recognizing that examination of facts specific to particular concerts would destroy the commonality and predominance required for class treatment, Plaintiffs' sole expert Dr. Phillips sought to rely on statistical "models" to show class-wide injury and damages, but that approach was rejected by the Court as unreliable and unsupported. *See* Dkt. 605 at 9-28. The Court's exclusion of Dr. Phillips' testimony leaves Plaintiffs with little or no evidence to demonstrate class-wide injury and damages, providing additional, independent reasons for denying certification. *See Wal-Mart*, 131 S. Ct. at 2554-56 (requiring proof that "all the individual . . . decisions" were unlawful); *In re Live Concert Antitrust Litig.*, 247 F.R.D. 98, 132-33, 136 (C.D. Cal. 2007); *see also In re Aftermarket Automotive Lighting Prods. Antitrust Litig.*, 276 F.R.D. 364, 368-69 (C.D. Cal. 2011) ("A class may not be certified unless the question whether

the class paid artificially inflated prices as a result of Defendants' alleged conspiracy to fix prices is amenable to common proof."); *In re Methionine Antitrust Litig.*, 204 F.R.D. 161, 166 (N.D. Cal. 2001) (denying class certification where plaintiffs lacked colorable method of determining injury in fact on a class-wide basis).

Defendants further contend that the Court's March 23, 2012 order makes clear that Plaintiffs have no objective criteria to identify class members. Dkt. 605 at 50-58 (ruling that Plaintiffs failed to provide any objective, reliable methodology for identifying "rock" concerts). This failure of ascertainability provides yet another reason that the classes cannot be properly certified. *See Sullivan v. Kelly Servs., Inc.*, 268 F.R.D. 356, 362 (N.D. Cal. 2010) ("An adequate class definition specifies 'a distinct group of plaintiffs whose members [can] be identified with particularity.'") (quoting *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978)); *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481, 493 (7th Cir. 2012) ("a class must be sufficiently definite that its members are ascertainable").

Plaintiffs acknowledge that in light of the Court's March 23, 2012 order, Plaintiffs are not likely to prevail in further litigation of the class certification issues.

V. CONCLUSION

For the foregoing reasons, the Parties' jointly proposed order decertifying the classes and denying certification for the putative classes should be granted to facilitate a final settlement and resolution of this MDL.

Respectfully submitted,

Dated: June 6, 2012

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